15aQremC

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 ------------------------------x
2
3 IN RE OPTIMAL U.S. LITIGATION,
3 10 CV 4095 (SAS)
4 ------------------------------x
4 New York, N.Y.
5 May 10, 2011
5 3:30 p.m.
6
6 Before:
7
7 HON. SHIRA A. SCHEINDLIN,
8
8 District Judge
9
9 APPEARANCES
10
10 LABATON SUCHAROW, LLP
11 Attorneys for Plaintiffs
11 BY: JAVIER BLEICHMER
12 ALAN I. ELLMAN
12 EDWARD W. MILLER
13
13 HUNTON & WILLIAMS, LLP
14 Attorneys for Defendants
14 BY: SAMUEL A. DANON
15 SHAWN P. REGAN
15 GUSTAVO J. MEMBIELA
16
17
18
19
20
21
22
23
24
25

1 (In open court)
2 THE COURT: Mr. Bleichmer.
3 MR. BLEICHMER: Yes.
4 THE COURT: Mr. Ellman.
5 MR. ELLMAN: Good afternoon, your Honor.
6 THE COURT: Mr. Miller.
7 MR. MILLER: Good afternoon.
8 THE COURT: Mr. Danon.
9 MR. DANON: Good afternoon, your Honor.
10 THE COURT: Mr. Regan?
11 MR. REGAN: Good afternoon.
12 THE COURT: Mr. Membiela.
13 MR. MEMBIELA: Yes, your Honor. Good afternoon.
14 THE COURT: There were certain issues that I did not
15 address in the written decision that I intend to address
16 through oral decision today. So the first part of this
17 conference you just get to sit back and listen. I'm sorry, but
18 it's a somewhat efficient method for us. I know it's not too
19 interesting for the lawyers. So here goes 16 pages of reading.
20 In an Opinion and Order dated April 28, 2011, I
21 granted in part and denied in part defendants' motion to
22 dismiss plaintiffs' second amended complaint for improper venue
23 and improper jurisdiction, lack of standing and failure to
24 state certain claims. I now provide my reasons for denying
25 defendants' motion to dismiss plaintiffs' claims under the

1 Securities Exchange Act of 1934.
2 The allegations in this case, the legal standards
3 under Rules 12(b)(6) and 9(b), and the federal securities laws'
4 antifraud provisions are well known. Because of that, I turn
5 directly to the motion to dismiss.
6 Plaintiffs allege that OIS and Clark committed
7 securities fraud in violation of Section 10(b) of the Exchange
8 Act, and that Banco Santander is liable under Section 20(a) as
9 a control person of OIS. I have already denied defendants'
10 motion to dismiss to these claims on the theory that the
11 Exchange Act does not apply to the extraterritorial
12 foreign-cubed transactions at issue in this case.
13 I now turn to defendants' arguments that plaintiffs
14 have failed to allege (1) actionable misstatements or
15 omissions, (2) scienter, and (3) reliance, and that plaintiffs'
16 allegations fail to satisfy the elements of control person
17 liability.
18 Plaintiffs bring Section 10(b) claims only against OIS
19 and Clark. I note preliminarily that plaintiffs are suing
20 Clark only for its allegedly false and misleading statements to
21 Pioneer. However, Clark does not challenge the adequacy of the
22 complaint's allegations that the Pioneer plaintiffs attributed
23 the advice provided by Pioneer to Clark or relied on Clark's
24 statements to Pioneer. Therefore, Clark's only real argument
25 for dismissal on this motion is that plaintiffs have failed to

15aQremC
1 allege scienter.
2 In moving to dismiss plaintiffs' 10(b) claims against
3 it, OIS argues that the statements and omissions in the
4 explanatory memoranda were made by Optimal Multiadvisors, also
5 known as the Fund, and not by OIS, and therefore Section 10(b)
6 does not reach OIS. I disagree. Even if the fund issued the
7 explanatory memoranda, plaintiffs' allegations render plausible
8 the inference that the statements contained therein are
9 attributable to OIS.
10 Of course, in a recent Second Circuit case in 2010,
11 the so-called PIMCO case that I know you all know, the Court
12 said, "Secondary actors can be liable in a private action under
13 Rule 10b-5 for only those statements that are explicitly
14 attributed to them."
15 So, as I just said, plaintiffs' allegations render
16 plausible the inference that the statements contained in the
17 explanatory memoranda are attributable to OIS. How do they do
18 so?
19 First, the cover page of the explanatory memoranda
20 lists the Fund as well as OIS, and the explanatory memoranda
21 treat the Fund and OIS similarly, dedicating a section to OIS
22 just as there is a section dedicated to the Fund. Moreover,
23 the explanatory memoranda state that OIS owned all the voting
24 stock of the Fund; that is, the ordinary shares; that the
25 Fund's board of directors...manages the business and affairs of

1 the Fund; that the directors are elected by the holders of the
2 ordinary shares; namely, OIS, and (not surprisingly in light of
3 this corporate structure) that OIS's CEO, Manuel Echeverria,
4 was a director of the fund. Thus, the explanatory memoranda
5 essentially states that OIS owned, ran and controlled the Fund.
6 Given plaintiffs' allegations that OIS, and not the Fund,
7 drafted the explanatory memoranda, the group pleading doctrine
8 alone provides a basis for upholding the sufficiency of these
9 allegations.
10 Second, the explanatory memoranda are attributable to
11 OIS because the underlying information being communicated that
12 constituted the false statements and material omissions are
13 identified to plaintiffs as OIS's responsibility. In Anwar
14 Judge Victor Marrero of this Court similarly sustained Rule
15 10b-5 claims against a third-party actor -- there, the Fund's
16 administrator -- because the administrator, and I quote
17 "allowed their name and the services they were ostensibly
18 providing to be included in the Fund's placement memoranda."
19 To the extent defendants rely on PIMCO, it is readily
20 distinguishable. The secondary actor in PIMCO was a law firm,
21 Mayer Brown, mentioned in passing in certain offering documents
22 as having represented the issuer in connection with the
23 offering. But the offering documents at issue in PIMCO did not
24 attribute a unique function to Mayer Brown (like the
25 explanatory memoranda here attribute the investment manager

1 function to OIS), the documents did not ascribe responsibility
2 to Mayer Brown for the false financial statements in issue, and
3 the documents did not identify or describe Mayer Brown in a
4 specific section of the offering documents.
5 Finally, I find persuasive plaintiffs' argument that
6 -- and I'm quoting from the plaintiffs' brief at page 7 --
7 that: "The statements in the explanatory memoranda are
8 statements by the CEO of OIS given that the CEO explicitly
9 assumed responsibility for the statements in his capacity as
10 director of the Fund" and because "statements by the CEO are
11 attributable to the corporate entity, which is OIS here." That
12 was all a quote from the Plaintiffs' memoranda, page 7.
13 In fact, the CEO signed the investment management
14 agreement on behalf of both OIS and the Fund. For all of these
15 reasons, plaintiffs have adequately pled that the statements in
16 the explanatory memoranda are actionable against OIS.
17 The SAC also presents a good deal of evidence of
18 conscious misbehavior or recklessness on the part of the OIS
19 and Clark. Plaintiffs allege that OIS and Clark had raised
20 internally all of the critical questions about the risk that
21 Madoff was running a Ponzi scheme, and yet failed to disclose
22 these risks to plaintiffs. For example, in 2002, Banco
23 Santander had, and I quote from the complaint, "detected a
24 number of issues that may involve legal risks" and instructed
25 OIS to meet with Madoff. Those issues, still quoting from the

1 complaint, "went to the heart of Madoff's Ponzi scheme because
2 they concerned the existence of the assets supposedly held by
3 Madoff, Madoff's self-custody and Madoff's secrecy."
4 Indeed, after consulting with law firms in New York,
5 OIS was advised to review transaction tickets to confirm that
6 Madoff was conducting actual trades with real counterparties,
7 an especially important check given that -- as OIS identified
8 -- Madoff acted as investment adviser, broker, and custodian, a
9 highly irregular combination that allowed Madoff to have no
10 external controls. Despite the significance of these concerns,
11 OIS failed to obtain any answers to its questions during its
12 meeting with Madoff, as revealed by the internal memorandum
13 produced by in-house counsel subsequent to that meeting.
14 By 2006, OIS's concerns about Madoff had only grown
15 larger. For example, around July 20, 2006 -- following a
16 February 1, 2006 visit to the offices of the company that is
17 BMIS by Clark, Atkins and OIS senior risk officer Rajiv
18 Jaitly -- Clark wrote a report summarizing the due diligence
19 conducted on Madoff over the prior two years. He concluded
20 that Madoff's "external auditor could not be considered
21 realistically independent" -- that's from the Clark report --
22 and further expressed concern that Madoff was -- and I quote
23 again from the Clark report -- "a privately owned family
24 business shrouded in secrecy and not regulated as an investment
25 adviser."

1 In a report written around the same time, Jaitly
2 flagged -- and now I'm quoting from the Jaitly report -- "the
3 current inability to verify actual trading activity in the
4 market through counterparty and other market user intelligence
5 as one of the difficulties with this account." Then returning
6 to the Clark report: "Indeed, although Clark had called the
7 largest Wall Street players as of mid-2006 OIS had "not yet
8 found a source at the major dealers with whom to confirm Madoff
9 options trading activity, neither has Fairfield."
10 Ultimately, Jaitly issued the following warning: "No
11 request was made to review how a trade is made. There is
12 absolutely no reason Optimal should not make such a request."
13 "Under the circumstances, the complaint portrays to
14 defendants' fraud alert should have been flashing red. A fair
15 inference that flows from the facts alleged is that if they
16 failed to see the perceptible signs of fraud, it may have been
17 because they chose to wear blinders." I didn't write that
18 eloquent language; Judge Marrero did in the Anwar case.
19 In moving to dismiss on scienter grounds, defendants
20 rely heavily on In re Bayou Hedge Fund Litigation,
21 characterizing that case is strikingly similar to this one.
22 But I disagree with defendants. Bayou involved a one-off
23 recommendation to invest in what was ultimately a Ponzi scheme.
24 But here, as in Anwar, plaintiffs allege "an ongoing fraud
25 spanning many years" where defendants "had a continuous stream

1 of incoming red flag information" to which they turned a blind
2 eye, in contrast to the information that the Bayou defendant,
3 it was alleged, "should have affirmatively sought out." Even
4 Bayou recognized this distinction. I quote from the decision:
5 "The failure to conduct due diligence is not the same thing as
6 knowing of or closing one's eyes to a known danger or
7 participating in the fraud." Actually, that was a quote from
8 the Anwar decision again describing Bayou.
9 Finally, the competing inferences that defendants urge
10 this Court to draw from Madoff's secrecy, refusal to identify
11 counterparties, or known deception of the SEC fall resoundingly
12 short of being more compelling than the inferences to be drawn
13 in plaintiffs' favor. Defendants essentially argue that
14 plaintiffs' detailed allegations of scienter show that
15 defendants did a lot of due diligence. But, as plaintiffs
16 persuasively argue -- and I quote from the opposition memoranda
17 -- "Defendants ignore that the diligence conducted raised their
18 awareness of Madoff's risks, which defendants then failed to
19 disclose or properly investigate to assure themselves that the
20 concerns over those risks were unwarranted."Defendants are not
21 alleged to have known that Madoff was a fraud. They are
22 alleged to have harbored serious concerns about Madoff that
23 they failed to disclose to investors, all the while profiting
24 from Madoff's fraud.
25 Defendants attempt to hide behind the SEC's failure to

1 stop Madoff is similarly unavailing given that defendants knew
2 Madoff was lying to the SEC. Moreover, the SEC's regulatory
3 and enforcement breakdown is irrelevant to defendant's failure
4 to disclose their deep-seated concern about Madoff. For all of
5 these reasons, plaintiffs' allegations raise an inference of
6 scienter that is cogent and at least as compelling as any
7 opposing inference.
8 Now I turn to reliance. The complaint alleges that --
9 and I quote from the complaint -- "plaintiffs, in ignorance of
10 the false and misleading statements and omissions made
11 recklessly or knowingly by defendants subject to this count,
12 relied, to their detriment, on such misleading statements and
13 omissions in purchasing shares in Optimal U.S." Paragraph 370.
14 In pleading reliance, plaintiffs need only allege -- and I
15 quote from Lentell in the Second Circuit -- "but for the
16 claimed representations or omissions, the plaintiff would not
17 have entered into the detrimental securities transactions."
18 Moreover, here, the explanatory memoranda required plaintiffs
19 to certify reliance.
20 This is what they were required to certify: "I,
21 having received and considered a copy of the explanatory
22 memoranda, hereby confirm that this subscription is based
23 solely on the explanatory memoranda together (where applicable)
24 with the most recent annual report and accounts of the Fund and
25 (if issued after such report and accounts) its most recent

1 unaudited semi-annual report."
2 Finally, there is a rebuttable presumption that
3 plaintiffs relied on defendants material omissions. That's the
4 Affiliated Ute presumption. Quoting from the In re Salomon
5 Analyst Metromedia Litigation, the Second Circuit has said:
6 "To fulfill the materiality requirements, there must be a
7 substantial likelihood that the disclosure of the omitted fact
8 would have been viewed by the reasonable investor as having
9 significantly altered the total mix of information made
10 available." Plaintiffs have adequately pled the materiality of
11 OIS's alleged omissions under this standard.
12 Turning to common law fraud. Because the elements of
13 fraud under New York law are substantially identical to those
14 governing Section 10(b), the identical analysis applies.
15 Accordingly as noted in the April 28 Opinion, plaintiffs have
16 also pled valid claims for common law fraud against OIS and
17 Clark.
18 Turning now to Section 20(a). Plaintiffs have also
19 adequately alleged Banco Santander's liability as a control
20 person of OIS under Section 20(a) of the Exchange Act. Banco
21 Santander owned a hundred percent of OIS and, thus, had -- and
22 I quote from a recent District Court opinion; it happens to be
23 mine In re Tronox -- Banco Santander, the hundred percent owner
24 of OIS had "the power to direct or cause the direction of the
25 management and policies of OIS through the ownership of voting

1 securities." Banco Santander also directly oversaw OIS's due
2 diligence on the Fund, a fact OIS touted to investors. Now I'm
3 quoting from the complaint: Indeed, "as set forth in the
4 Second Courvoisier Memorandum, Banco Santander and OIS were
5 well aware that Madoff's self-custody was a highly unusual
6 arrangement, which made it virtually impossible to verify the
7 existence of assets as well as the integrity of the account
8 statements issued by BMIS." That was, of course, from the
9 complaint. As such, Banco Santander had actual knowledge of
10 the numerous red flags detailed in the memorandum created at
11 its instruction. Such active of control and actual knowledge
12 meet the culpable participation requirement.
13 That's it. So now that completes the decision on all
14 of the pending motions. And we can now discuss, so to speak,
15 what's left open given those decisions. I did, for example,
16 give leave to replead with respect to common law claims if
17 they're pled as derivative claims. I don't know if you intend
18 to do that.
19 MR. BLEICHMER: Your Honor, if I may address that.
20 With respect to re-pleading, we are considering that, and we
21 would like an extra week to make a final decision.
22 THE COURT: When would that be until?
23 MR. BLEICHMER: Next Tuesday.
24 THE COURT: Next Tuesday.
25 MR. BLEICHMER: But if I may raise --

1 THE COURT: Let me get just that date on the record.
2 So you wanted until May 17 to actually file an amended
3 complaint if you decide to do it?
4 MR. BLEICHMER: Correct.
5 THE COURT: All right. Go ahead.
6 MR. BLEICHMER: Now, your Honor suggested that perhaps
7 further briefing on the Wagoner issue would be appropriate, and
8 I would like to respectfully submit that we do not need to
9 amend the complaint in order to provide that briefing because,
10 in all truthfulness, we are disinclined to amend the complaint.
11 We haven't foreclosed that possibility.
12 THE COURT: Right. I understand.
13 MR. BLEICHMER: We would like to explore the
14 possibility of simply submitting additional briefing on
15 Wagoner, which would be fairly limited.
16 THE COURT: Speaking of additional briefing, I also
17 said I was amenable to defendants filing an forum
18 non conveniens motion. I don't know if defendants are
19 intending do that, and I don't know whether the defendants have
20 made a decision on the potential motion to reconsider which
21 they knew I was not terribly happy about. And I had a question
22 about CAFA jurisdiction for the plaintiffs. Is this still a
23 viable class action now that you don't have the so-called
24 Santander plaintiffs, do you still have a viable class. So
25 those are a couple questions I still had.

1 MR. BLEICHMER: We do to the extent that Jonathan
2 Clark remains a defendant. We'd also like to raise some issues
3 that would address the non-Pioneer plaintiffs coming back
4 into --
5 THE COURT: The so-called Santander plaintiffs?
6 MR. BLEICHMER: The Santander plaintiffs, correct.
7 THE COURT: Well, I dismissed them.
8 MR. BLEICHMER: I understand, and we would like to
9 raise an issue about that which we will color whether we
10 replead the complaint or not.
11 THE COURT: What issue do you want to raise?
12 MR. BLEICHMER: Your Honor, the forum selection clause
13 is at the heart of the Bahamas account agreement, which is the
14 basis for dismissing the Santander plaintiffs --
15 THE COURT: Yes.
16 MR. BLEICHMER: -- was submitted but in an incomplete
17 form, and only excerpts of that agreement were submitted.
18 There is a separate part of that agreement, which
19 actually I would say, from plaintiffs' standpoint, negates the
20 conclusion reached by the Court as to why that agreement
21 applies to the other affiliates, and if I may address that.
22 THE COURT: I don't really understand. So you want me
23 to do all the work over again because you didn't point this out
24 while the motion was pending? In other words, you knew what
25 parts of the agreement or the terms and conditions were

1 submitted. Why didn't you scream then and say you don't have
2 the whole thing, and there are clauses that you don't have that
3 override or defeat the clauses that the other side has
4 submitted. I don't think it's fair to have a Court spend
5 months working on something and then say do it again, here are
6 a few more clauses that you didn't consider. So essentially
7 you're saying you're thinking of moving to re-argue for
8 reconsideration.
9 MR. BLEICHMER: If I could --
10 THE COURT: Yes, but the standard is tough now. You
11 have to show that you couldn't have submitted it then.
12 MR. BLEICHMER: If I could explain. We did raise in
13 our opposition brief, we did note that the defendants only
14 submitted excerpts of the agreement.
15 THE COURT: Yes.
16 MR. BLEICHMER: So we didn't completely discount that.
17 THE COURT: But you didn't submit the excerpts that
18 you say defeat the excerpts they did submit.
19 MR. BLEICHMER: Now, that is fair, your Honor, and
20 there is some confusion --
21 THE COURT: It's unfair for me to do this twice. Very
22 unfair.
23 MR. BLEICHMER: If I may submit, there is precedent in
24 the Eastern District of New York for a motion to reconsider
25 when the decision on an agreement is based on an incomplete

1 submission.
2 THE COURT: Whose fault was that?
3 MR. BLEICHMER: In that case --
4 THE COURT: I don't care about that case. In this
5 case, the fault is yours if you thought it was incomplete, why
6 didn't you insist on submitting the remainder? You know how to
7 scream. I have never met yet lawyers that don't know how to
8 get my attention on a letter, a phone call or something, and
9 saying the other side has only given you half the document and
10 for completeness sake, we have to submit the other half. I
11 mean, it really would be a shame if you turn out to be right,
12 so to speak.
13 MR. BLEICHMER: Alternatively, we would ask for leave
14 to replead on this issue under Rule 15, leave to replead --
15 your Honor well knows it. I don't need to repeat the standard,
16 but that would be an alternative for us to reintroduce this
17 issue and introduce the entire agreement.
18 THE COURT: How many words or clauses do you have that
19 would defeat the entire basis for my opinion?
20 MR. BLEICHMER: If I may --
21 THE COURT: Yes.
22 MR. BLEICHMER: And the basis of the opinion was
23 essentially that it was foreseeable for the Santander Bahamas
24 affiliate to -- for that agreement to extend to the other
25 affiliates, to the Banco Santander in Spain and to Optimal

1 Investment Services in Geneva, and there is a clause that was
2 not referred to that specifically says that the liability of
3 the bank, meaning Santander Bahamas, is not based on the
4 liability of its affiliates. So, the agreement itself says
5 this agreement is only applicable to Bahamas and, it's not
6 meant to extend to the other affiliates.
7 In light of that, our argument is that it was not
8 foreseeable for the plaintiffs to understand that the forum
9 selection clause applied to Optimal Investment Services in
10 Geneva or to Banco Santander in Spain, and so there is a real
11 question as to the full interpretation of the entire agreement.
12 THE COURT: And what's your response to that,
13 Mr. Danon, or whoever is taking the lead on that issue?
14 MR. DANON: Well, your Honor, first of all, I do want
15 to clarify that we did not contact the chambers about the
16 motion for reconsideration. That was the plaintiffs --
17 THE COURT: I'm sorry. Thank you.
18 MR. DANON: I just want to clarify.
19 THE COURT: So it was them all along.
20 MR. DANON: Second of all, your Honor, I think that,
21 again, I have not seen that clause that he is alluding to.
22 THE COURT: You haven't seen it?
23 MR. DANON: I've seen the complete copy, and I don't
24 know what specific section he's talking about.
25 THE COURT: Let him show it to you now. Wait. Wait.

1 Wait. Why don't you look at it for a minute. He's going to
2 show it to you. Take a minute.
3 MR. DANON: I will say this, your Honor...
4 THE COURT: Would you just do me a favor and take a
5 minute?
6 MR. BLEICHMER: May I approach and provide your Honor
7 a copy?
8 THE COURT: No.
9 MR. DANON: Your Honor, as I read this clause, I don't
10 see how it changes the foreseeability aspect of what's there.
11 This is a clause that (1) it relates back to paragraph 63,
12 indemnification and exculpation; and (2) talks about without
13 limiting the generality of that section 63, it talks about the
14 bank not being liable to you for any omission, error,
15 misconduct, negligence, default, insolvency of any of its
16 representative offices, correspondents or intermediaries.
17 So it's not dealing with the forum selection clause,
18 and it doesn't change the foreseeability aspect of what was
19 argued. Now, I will go back to the completeness here, which
20 was, you know, we started with a letter brief here. In that
21 letter brief, we specifically alluded to this forum selection
22 clause argument. We were here before your Honor, and we
23 presented it in that we had a brief argument about that or
24 presentation about it, and then it was fully briefed.
25 So I think that bringing it at this point -- and,

1 again, I don't see that the argument is on or relevant to that
2 clause or changes anything that has been done. And I think
3 it's just trying to bring in something that they could have
4 done prior.
5 THE COURT: All of that said, it's awfully narrow.
6 You basically want me to consider that clause. I mean, are you
7 really going to do it and nothing more, and limit it to that?
8 You should be able to do it by Monday, period.
9 MR. BLEICHMER: We can do that, your Honor.
10 THE COURT: And short.
11 MR. BLEICHMER: Yes, your Honor.
12 THE COURT: No more than ten double-spaced pages. And
13 they should be able to respond by the following Monday in no
14 more than ten-double spaced pages. That would take us to the
15 16th, the 23rd, and you should be able to reply by the end of
16 the week, the 27th, so nobody bumps into Memorial Day but me.
17 The rest of you will be done.
18 So on that very limited schedule, on that very limited
19 point, ten pages, ten pages and five pages, double-spaced
20 solely on that issue, I will look at your argument, but I can't
21 tell you that it's going to do you any good.
22 MR. BLEICHMER: Thank you, your Honor.
23 MR. DANON: Your Honor, if I could just ask for
24 clarification what the issue is because it was our motion to
25 dismiss.

1 THE COURT: The issue is he's saying if you had had
2 this complete document, you would have ruled in a different
3 way. That's the whole argument, period. If you had considered
4 this whole document as part of the complaint which you're
5 allowed to do, you would have reached the diametrically opposed
6 conclusion; please reconsider solely on that argument, which we
7 can make in ten pages or less by Monday, today already being
8 close of business Tuesday. You get till the 23rd. They get
9 till the 27th. Five page reply, and that's it. So I have 25
10 pages to read, and it's in fast before I forget what this case
11 is even about.
12 MR. DANON: Just to clarify, it's a motion for
13 reconsideration.
14 THE COURT: I'm not going to worry much about the
15 procedural niceties. I will look at the darn agreement because
16 it is part of the same agreement and figure out whether I think
17 it would have turn everything around. That's what you're going
18 to address. I would not waste your pages telling me the
19 standard, which I know very well. Yes, they could have; yes,
20 they should have put the thing in. I understand all of that.
21 But let me look at the whole document and see if it makes any
22 difference. You're pretty confident it doesn't. Having been
23 here before, you're pretty confident it wouldn't have made any
24 difference. Putting that aside, since we just figured out the
25 briefing issue --

1 MR. BLEICHMER: There is a discrete brief issue on
2 amending the complaint. Your Honor alluded to the fact that
3 the Pioneer plaintiffs may be atypical. So we would ask for a
4 very limited ability to amend the complaint just to add named
5 plaintiffs, but what we are very concerned about is we do not
6 want to reopen any substantive issues.
7 THE COURT: Right. You don't want a new motion to
8 dismiss in six more months, I agree. Because we're not a class
9 certification. We're not dealing with typicality or whatever.
10 Just do it so it's there on the record. In other words, that's
11 the operative complaint. I will grant you leave to amend to do
12 that.
13 MR. BLEICHMER: Thank you, your Honor.
14 Then on that point, with the understanding that your
15 Honor has the standing to exchange that claim to Section 10(b)
16 and the 20(a) claims. Now that we are all here, I just want to
17 make sure that it is clear that there is no -- the PSLRA stay
18 of discovery doesn't apply, and we can proceed forward with
19 discovery.
20 THE COURT: I ruled. I denied the motion to dismiss.
21 Of course, there's no PSLRA stay, of course not. Those claims
22 are proceeding. You just heard the opinion.
23 MR. BLEICHMER: Thank you, your Honor.
24 MR. DANON: Your Honor, if I can address some issues
25 procedurally. First of all, if I understand plaintiffs

1 correctly, they want to add a new plaintiff. I just want to
2 make clear to the Court that depending on where that plaintiff
3 stands, where that plaintiff had an account, that we would have
4 arguments similar to the improper venue argument or there might
5 be an arbitration clause that there would have to be an
6 arbitration. If it is a non-Pioneer plaintiff --
7 THE COURT: Right.
8 MR. DANON: -- it may change the underlying procedural
9 aspect, and we would like leave to file at that point.
10 THE COURT: Absolutely not, without a conference with
11 me explaining it because it may be that you just want to repeat
12 the 50 pages of briefing we've already gone through. No. If
13 it's a discrete thing and you say this guy has a mandatory
14 arbitration clause, he's out. You should be able to alert your
15 adversary of that in a letter, and then they are going to have
16 to agree. So he's going to look at that carefully.
17 As long as I have a conference first. I am not
18 granting it today open ended, no way.
19 MR. DANON: Understood. I wanted to make sure the
20 Court was aware that that -- I had that concern, the ability to
21 be able to bring that argument.
22 THE COURT: Bring that argument; not that motion.
23 MR. DANON: Right. To bring the argument depending on
24 what plaintiff it is that --
25 THE COURT: Bring it to the court in a premotion

1 conference.
2 MR. DANON: Right, following your Court rules.
3 The other issue that goes with that, your Honor, is I
4 would like to get our time to either, you know, to hold in
5 abeyance the time to answer so we can get our motions filed.
6 THE COURT: What motions? What --
7 MR. DANON: One is we have a forum non-convenes
8 motion.
9 THE COURT: Right.
10 MR. DANON: Two, we have two sets of 12(b)(6) motions
11 that your Honor recognized in the order.
12 THE COURT: Namely?
13 MR. DANON: Your Honor, I guess you said we could
14 address the motions for derivative claims if they file.
15 THE COURT: If they file, which right now they're
16 leaning toward not.
17 MR. DANON: Right. The motion to dismiss Counts 13
18 through 15 by Pioneer on substantive grounds. And the motion
19 to dismiss Banco Santander on the fraud count for aiding and
20 abetting.
21 THE COURT: For what?
22 MR. DANON: For aiding and abetting the fraud.
23 THE COURT: Oh.
24 MR. DANON: And you recognize those in the Order.
25 In addition to that, your Honor, I would ask if we

1 could also brief one issue that comes about because the Pioneer
2 plaintiffs are currently the only plaintiffs in this case,
3 there is one claim, which is the negligence misrep claim,
4 against Banco Santander International which, because the
5 Pioneer plaintiffs are the only plaintiffs left, shouldn't
6 stand or the elements aren't there because they haven't made a
7 connection between Santander U.S. and Pioneer.
8 It's akin or it flows out of what you had found with
9 the aiding and abetting claim at the very end of your decision
10 on page 64, the last sentence, actually: In the absence of any
11 allegations rendering plausible the inference that the Pioneer
12 plaintiffs injury was a direct or reasonably foreseeable result
13 of Santander U.S.'s conduct, this claim fails. So, too, we'd
14 like to argue that issue in addition or as a tagalong to the
15 other 12(b)(6) arguments just as a housekeeping matter to clean
16 that up.
17 MR. BLEICHMER: Your Honor, I think a lot of those
18 issues will depend on whether the Santander plaintiffs come
19 back into the case or not. So I think it makes sense to wait
20 until your Honor's decision on whether Santander plaintiffs are
21 coming back or not. If they do, then the issue is moot. If
22 the Santander plaintiffs do not come back in, then we can brief
23 those issues.
24 THE COURT: What your adversary is saying, Mr. Danon,
25 is that you should save your money for awhile -- money that it

1 takes to write motions -- until you see if he's successful
2 bringing the Santander plaintiffs back in based on this fuller
3 submission of the terms and conditions agreement.
4 MR. DANON: I understand. I think, your Honor, it
5 would also depend on if they replead what they actually replead
6 or not.
7 THE COURT: He is only talking about this additional
8 plaintiff, which not the Santander plaintiff, and he's also
9 talking about having not yet made a final decision on
10 derivative claims, I haven't heard any other proposed
11 amendment.
12 MR. BLEICHMER: Correct, your Honor.
13 THE COURT: It's up to you, do you want to start your
14 briefing on these limited issues that you just laid out now or
15 do you want to wait and see?
16 MR. DANON: I would prefer to wait, your Honor, until
17 it's ripe, although I would just like my time for answering the
18 complaint to also be --
19 THE COURT: Why can't you work that out with
20 Mr. Bleichmer? I think you could.
21 MR. DANON: I think I could work that out with
22 Mr. Bleichmer. We've worked out a lot of things.
23 THE COURT: That's good, and I'll sign off. If he
24 extends you time to answer, I'll sign off.
25 MR. DANON: Thank you.

1 I think the only other thing I'd like to raise to your
2 Honor has to do with the extraterritorial argument and the
3 Morrison argument. You have in the order identified that that
4 is a significant issue that is ripe for motion for summary
5 judgment or at least there should be a record on motion for
6 summary judgment.
7 Based on the documents that we know and we've seen
8 from the Pioneer plaintiffs, this is a very direct issue. It's
9 a very simple and straightforward issue. So if only the
10 Pioneer plaintiffs are left in this case, what we would propose
11 to your Honor is that we have a direct and limited discovery
12 phase targeted at a motion for summary judgment that can be
13 filed within 60 days of their ultimate complaint, you know, new
14 complaint or wherever we end up here, but it is such a direct
15 and clear-cut issue that we would like to deal with that as a
16 threshold matter, it remains a threshold matter and, of course,
17 subject matter jurisdiction is a threshold issue that could be
18 dispositive of that claim.
19 THE COURT: But not of the case.
20 MR. DANON: Not of the case, your Honor, but of that
21 claim.
22 THE COURT: Yes, but I can't do it piecemeal. I don't
23 think they should have to do discovery piecemeal, and I
24 shouldn't have to do multiple motions in the same case. It's
25 bad enough the way the motion to dismiss is being carried on.

1 There may be three or four motions instead of one, which I've
2 never allowed in 20 years, but apparently I've now allowed, but
3 I don't want summary judgment to be all fractured too. So if
4 it's not case dispositive, I don't want to do it. You'll have
5 to wait until the close of discovery.
6 MR. DANON: Your Honor, it does affect how discovery
7 goes forward if that claim is in or not. What I would alert to
8 the Court is that, for instance, the contract notes the Court
9 relied upon, the contract notes of the Pioneer plaintiffs are
10 clear on their face as to the purchase and issuance in Ireland.
11 THE COURT: If they were clear on their face, then as
12 far as you're concerned, I erred; and if I erred, I'm sticking
13 with it. I had it on its face. It was in front of me.
14 MR. DANON: The contract notes that they provided on
15 the motion to dismiss were contract notes of non-parties, as we
16 discussed.
17 THE COURT: Right.
18 MR. DANON: The Pioneer plaintiff contract notes,
19 which are contract notes, that are their documents, and I
20 assume they saw them, are clear on their face that they were
21 issued in Ireland. It's a motion for 12(b)(6). I can't
22 contradict what's there, but I am just telling you that is why
23 we believe a direct summary judgment motion that at that point
24 would be efficient in an efficient way --
25 THE COURT: I hear you, but I am not inclined. I have

15aQremC

1 to protect myself. It's not efficient for me to do any more
2 motions in this case. As inefficient as that is for you, we
3 have different interests.
4 What is it, Mr. Bleichmer?
5 MR. BLEICHMER: The one last point, your Honor. To
6 the extent that, again, whether Santander plaintiffs are back
7 in the case or not in the case may affect the forum
8 non-convenes analysis to the extent that --
9 THE COURT: I have delayed the rest of the briefing.
10 MR. DANON: Your Honor --
11 MR. BLEICHMER: If I may suggest briefing on the
12 Wagoner issue, we could be ready to file it by next Friday.
13 THE COURT: And what will that achieve? I don't
14 recall any more. What will that bring in or out?
15 MR. BLEICHMER: I thought we had agreed that it would
16 make sense to just re-brief the Wagoner issue without amending
17 the complaint. So to the extent that we are to do that, we can
18 submit that by next -- by Friday, the 18th, I believe -- the
19 20th.
20 THE COURT: What would be the result of it if you win?
21 MR. BLEICHMER: It would essentially sustain our
22 claims for negligence of breach of fiduciary duty what now have
23 been dismissed as derivative claims, and the basis for that is
24 under Wagoner there is no need to plead a derivative case.
25 Under Wagoner, the argument is the claims are not derivative;

1 the claims are direct. So our point is we don't need to
2 replete. The complaint as it stands establishes all the facts,
3 and it's just a question of laying out the Wagoner issue at
4 length which neither of the parties fully did, and I don't
5 think your Honor ruled on that on the motion to dismiss.
6 THE COURT: Anything you want to say?
7 MR. DANON: Your Honor, I just wanted -- my suggestion
8 here is that we get clarity on all the procedural steps that we
9 just ended up with here, because what -- you know, I think the
10 way we've ended up here is that they are going to file a brief
11 on the reconsideration issues which we will respond to...
12 THE COURT: I didn't hear the word issues. There was
13 a single issue.
14 MR. DANON: The one issue, which is that one clause.
15 THE COURT: Yes. Right.
16 MR. DANON: We are going respond. They are going to
17 reply. But we are going to hold in abeyance the answer and
18 other motions --
19 THE COURT: Right.
20 MR. DANON: -- pending the resolution of that issue.
21 THE COURT: Well, but he's saying the so-called
22 Wagoner issue doesn't depend at all on whether the Banco
23 Santander or the Santander plaintiffs come back in. It only
24 affects whether there are direct claims or derivative claims.
25 So he says we ought to do that now too and be done with it, and

1 I assume you agree with him that nobody briefed the Wagoner
2 issue thoroughly in the pages you had.
3 MR. DANON: I think that's what you had found. In
4 other words, we had briefed it, but --
5 THE COURT: You were satisfied that you briefed it
6 fully?
7 MR. DANON: Your Honor, if they're going to brief it
8 again, I'd like the opportunity to respond. I guess I am
9 just -- I just want to be clear on what we are filing, when,
10 and when our obligation time is for, for instance, our motion
11 to dismiss based on forum non-convenes and our 12(b)(6) motion.
12 THE COURT: We already talked about that. I thought
13 you said you would rather wait for the decision on the Banco
14 Santander plaintiffs.
15 MR. DANON: And I do. I want to wait until the
16 decision on the Santander plaintiffs, and then they are going
17 to add a new plaintiff.
18 THE COURT: Correct.
19 MR. DANON: Then we will be able to address that.
20 THE COURT: Correct.
21 MR. DANON: And we will address all the timing issues.
22 THE COURT: Correct.
23 MR. DANON: Thank you, your Honor.
24 THE COURT: What else do you want to talk about?
25 MR. BLEICHMER: Nothing further, your Honor.

1 THE COURT: What's the briefing schedule you propose
2 on Wagoner issue?
3 MR. BLEICHMER: We are ready to submit our brief by
4 Friday, May 20.
5 THE COURT: If he submits a brief on that issue on the
6 20th, you should be able to respond in a week since you were
7 fairly satisfied you did it in the first place well enough. I
8 would like to get these two in and out quickly. Could you get
9 it in by the 27th?
10 MR. DANON: That's fine, your Honor.
11 THE COURT: Then you have to reply, and you will run
12 into Memorial Day, but that's life. It's a narrow issue again.
13 You should reply by the 3rd. It's one week, one week, one
14 week, and be done with this. There should be page limits there
15 too: Ten, ten and five, double-spaced.
16 And then when the decision comes out on those two, we
17 can have another conference, and you can make your presentation
18 of what motions you wish to file.
19 When is the amended complaint going to be filed, the
20 one that adds a plaintiff? So he could take a look at that and
21 analyze it for the next conference? It's not a lot of work.
22 Seriously.
23 MR. BLEICHMER: It is not. I am just trying to think
24 of all the issues we need to brief. We can do that --
25 THE COURT: It's not a brief. I'm granting leave to

1 amend. Just submit a proposed order of three lines that says:
2 Plaintiff file an amended complaint, I'll put my name on it,
3 and they'll take it in the clerk's office, that's it.
4 MR. BLEICHMER: We can do that by this Friday, your
5 Honor.
6 THE COURT: This Friday?
7 MR. BLEICHMER: Yes.
8 THE COURT: You will be able to look at that,
9 Mr. Danon, and be ready to discuss it at the next conference.
10 You'll have to work with him to extend your time to answer.
11 I'll sign the stip once you agree to it with each other. OK?
12 OK. Thank you.
13 (Adjourned)
14
15
16
17
18
19
20
21
22
23
24
25